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No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1992

ARLENE ELIZABETH GODWIN, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

THOMAS MARTELE GOGGANS
P.O. Box 1307
Montgomery, AL 36101
(205) 834-2511

Counsel for Petitioner
Arlene Elizabeth Godwin

## QUESTIONS PRESENTED[1]

1. Whether U.S.S.G.2D1.1 which provides that each marijuana plant is the equivalent of one kilogram of marijuana whenever 50 or more plants are involved violates due process and equal protection provisions of the Fifth Amendment to the United States Constitution because there is no rational basis for selection of fifty plants as the trigger for enhanced sentencing.

2. Whether in a prosecution under 21 U.S.C. 841(a) where there was evidence of simple possession for personal use the trial court's refusal

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[1] In the proceedings below, the case was prosecuted by the United States of America. The defendant-appellants were Arlene Elizabeth Godwin, petitioner herein, and Theron D. Godwin.

to give a lesser included offense instruction on simple possession of marijuana ran afoul of Rule 31(c), F.R.Cr.P., the theory of defense and lesser included offense instruction requirements, and due process.

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ARLENE ELIZABETH GODWIN,

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE ELEVENTH CIRCUIT

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Petitioner, ARLENE ELIZABETH GODWIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, which in not reported, is affixed as "Appendix A." The opinion of the United States District Court for the Northern District of Florida on sentencing issues, which is not reported, is affixed as "Appendix B."

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 25, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES INVOLVED

This case involves:

The Fifth Amendment to the Constitution of the United States which provides: "No person shall be...deprived of life, liberty or property, without due process of law...."

21 U.S.C. 841(a) which provides

that "... it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture ... or possess with intent to distribute ... a controlled substance ...."

21 U.S.C. 841(b)(1)(A)(vii) which provides in pertinent part that an individual convicted under 21 U.S.C. 841(a) "shall be sentenced to a term of imprisonment which may be not less than 10 years if the case involved 1,000 or more marijuana plants."

21 U.S.C. 844, which provides in pertient part: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance...."

United States Sentencing Guideline 2D 1.1, which provides:

> In the case of an offense involving marihuana plants, if the offense involved (a) 50 or more marihuana plants, treat each plant as equivalent to 1 KG if marihuana; (B) fewer than 50 marijuana plants, treat each plant as equivalent to 100 G of marijuana. Provided, however, that if the

actual weight of the marijuana is greater, use the actual weight of the marijuana.

## STATEMENT OF THE CASE

### A. Course of Proceedings

Petitioner Arlene Elizabeth Godwin was charged, along with her ex-brother-in-law, Theron D. ("T. D.") Godwin, in a three count indictment in the Northern District of Florida. Count I charged that they had conspired to knowingly and intentionally manufacture more than 1,000 marijuana plants or possess with intent to distribute marijuana. Count II charged that they had knowingly and intentionally manufactured more than 1,000 marijuana plants or possessed with intent to distribute marijuana. Count III charged that they had used a firearm during a drug-trafficking offense. (R1-1). The case was tried before a jury in May of 1991. Both were found guilty under all three counts. On October 31, 1991, Arlene Godwin was sentenced to 151

months on counts I and II to be served concurrently and 60 months on Count III to be served consecutively. The United States Court of Appeals for the Eleventh Circuit affirmed on January 25, 1993.

B. Material Facts

On February 8, 1991, David Ross, a pilot and investigator for the Santa Rosa County, Florida Sheriff's Department, spotted three marijuana seed beds located on land owned by the Champion Paper Company.[1] (R2-72-2, 8). He directed deputies on the ground below to the seed beds. (R2-72-7).

Ross observed hunting roads and dirt roads in the Champion Paper Company area. (R2-72-28). The closest residence to the seed beds was T. D. Godwin's which was approximately two

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[1] As a pilot, Ross had discovered large quantities of marijuana growing all over Santa Rosa County, a county covering more than 1,000 square miles. (R2-72-22).

hundred yards away. (R2-72-8). Ross also saw four to ten other houses in the general area. (R2-72-29). Neither he nor anyone else ever saw T. D. Godwin or anyone else going back and forth from the residence to the seed beds. (R2-72-32).

When deputies arrived at the seed beds, they found three trenches, approximately 6 feet by 2 or 3 feet. (R2-72-40). One was covered by a camouflage painted metal screen and was full of trays containing soil and marijuana seedlings. (R2-72-41). The other two were partially full, with camouflage screen off to the side. (R2-72-41).

The deputies found mothballs in the trenches around the trays and purplish pesticide spread throughout the beds. (R2-72-44 through 45). They recovered sticks, pieces of white PVC pipe, and metal ties bent in "U" shapes from the

beds. (R2-72-47, 48, 50).

At approximately 11:00 a.m. or 11:05 a.m., the deputies drove to T. D. Godwin's residence. (R2-72-55). According the deputy in charge, they went there to investigate because it was the closest house. (R2-76-93, 114). While one of the deputies spoke to T. D. Godwin, two others observed several rolls of brown and green painted wire screen rolled up in the entrance of an outbuilding. (R2-72-56). T. D. Godwin refused to consent to a search and asked the deputies to leave. The deputies left and obtained a state court search warrant.[2]

Before executing the search warrant, the deputies counted the individual the marijuana seedlings for a total of 10,106 seedlings. (R2-72-80-1). The seedlings were contained in

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[2] During this encounter, Arlene Godwin was raking leaves and such in the yard. (R2-76-50, 80, 94).

thirty-four trays. (R2-72-82). Small white tabs with initials, such as "AFG," were inside these trays. (R2-72-89 through 90).

The seed beds themselves were in an area with tall pine trees, ranging in height from 20 feet to 30 feet,[3] approximately 50 to 100 hundred yards from the road leading to the Champion Paper plant. (R2-72-91 through 92). This dirt road had some four-wheeler tracks on it. (R2-72-65). T. D. Godwin's house was located at a point where several dirt roads converged. (R2-76-763). There were no trails between T. D. Godwin's residence and the seed beds. (R2-76-46). It was impossible to see any residence, including T. D. Godwin's, from the seed beds. (R2-76-47).

Around 5:50 p.m. on February 8,

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[3] The prosecutor described the location as "in the middle of the woods." (R-2-76-47).

1991, numerous deputies executed the search warrant. (R2-72-99). Both T. D. Godwin and Arlene Godwin were inside the residence when the warrant was executed. Arlene Godwin was cooking in the kitchen when the deputies arrived to conduct the search. (R2-75-832).[4] $1,400.00 in cash was taken from her. (R2-75-834). $3,662.20 in cash was taken from T. D. Godwin. (R2-72-131).[5] A number of guns were seized from the premises. Deputies seized five guns from the hall closet: a Remington 1100 12-gauge used for turkey hunting, which was loaded

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[4] Arlene Godwin testified at a suppression hearing that she had stayed overnight on occasion and that she had gone over that day to borrow the washing machine and cook dinner. (R2-76-79). She also testified at the suppression hearing that she had personal items stored at the residence. (R2-76-83).

[5] $1,652.30 of this amount came from T. D. Godwin's wallet, along with a purchase order for John Deere equipment from Beard Equipment Company in the name of Jack Gordon and a receipt for $31.55 for some Krylon spray paint. (R2-72-133).

(without ammunition in the firing chamber) (R2-72-137, 141, 157); a loaded shotgun (R2-72-137, 141 through 142, 159 through 160); two unloaded rifles (R2-72-138, 142 through 143); and a loaded rifle normally used for deer hunting. (R2-72-143, 161). Deputies got six other guns from inside the house: from the living room, a loaded shotgun (R2-72-138, 143); from under the bed in the master bedroom, another loaded shotgun (R2-72-138, 143, 161); from inside the front entrance, a loaded shotgun (ammunition not in the firing chamber), of a type normally used for hunting (R2-72-138, 143, 158 through 159); from a different bedroom, described as bedroom number one during the trial, a loaded shotgun, contained within a case (R2-72-138, 143); from an end table in the living room a loaded, semi-automatic pistol, contained within its case (R2-72-139, 144); and from a storage room,

an unloaded, squirrel hunting rifle (R2-72-144, 159 through 160).

Outside the residence in a green pick-up truck titled to Arlene Godwin deputies found a box for a Titan pistol (R2-73-330, 336). Deputies seized a .38 Special, containing four shells from T. D. Godwin's brown pick-up truck. (R2-73-303, 304). Deputies seized a .32 pistol loaded with five shells from under the driver's seat of a 1979 Lincoln. (R2-73-304).

No automatic weapons were seized. (R2-72-163). No serial numbers were filed off any of the firearms (R2-72-165). No unusual ammunition was seized. (R2-72-166). In the words of the deputy who seized most of the guns, the guns were the "types that you would expect to find in anybody's home that does a lot of hunting...or collects firearms." (R2-72-166).

In addition to seizing guns, the

deputies seized a large garbage bag in the hallway, containing ten bags containing fifteen individual white bags, containing eight zip-lock bags of marijuana weighing approximately one ounce. (R2-72-175 through 177). A similar bag was seized containing thirteen individual white bags, containing 8 one-ounce zip-lock bags of marijuana. (R2-72-177).

In a hall closet, they found a bag containing approximately eighteen pounds of marijuana seeds and clear baggies of marijuana. (R2-72-178 through 179). They also seized white plastic tabs with writing on them such as "AFG 1987" (R2-72-191). One tab contained writing stating "AFG, 1989, Arlene's." (R2-72-191).

From bedroom number one,[6] they seized a smoking bong and pipe (R2-72-

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[6] Testimony indicated that Arlene Godwin admitted she had stayed in this room. (R2-73-242).

211 through 213), two match boxes and a film container holding marijuana residue, and the remains of a marijuana cigarette. (R2-73-214). They also seized Nintendo games and ladies' toiletries. (R2-73-217). In the closet, they found seven sets of florescent lights, with twin tubes and long wires attached, and women's clothing. (R2-73-218 through 220). They also located some children's clothes and children's books in this same room. (R2-73-224).

From the utility room, they seized two white bags, one with eleven clear baggies of marijuana and the other with six clear baggies of marijuana. (R2-73-246). Another bag contained marker pens, prescription bottles, plastic bags, scissors and marijuana. (R2-73-248). One of the bags contained marijuana, marijuana cigarettes, and seeds. Another bag contained three

prescription bottles bearing T. D. Godwin's name. (R2-73-249). Another contained a black marking pen and tabs with "AFG" written on them. (R2-73-249). The deputies discovered triple beam scales on the floor along with hand-rolled cigarettes, double-wide paper, rolling machines, zip-lock bags and a band-aid. (R2-73-251). They found ten rolls of weed block (black plastic shields) on top of a styrofoam cooler. (R2-73-254). They also discovered ten empty garbage bags, debris from a vacuum cleaner, a camouflage tarp, a Platex glove box, and cut hair in a bag. (R2-73-255 through 258).

In the kitchen, they located a thermal jug containing mothballs. In a cabinet above the stove, they found forty-nine boxes of bags, lose bags, five rolls of string, twine, binoculars, and a tape recorder. (R2-73-260).

In the living room, they found a rolled marijuana cigarette in an ashtray on a coffee table. (R2-73-275). They also seized scales from the top of a living room mantel. (R2-73-276).

From a hallway gun cabinet, deputies seized a book entitled "How to Avoid Electronic Eavesdropping and Privacy Invasion." (R2-73-284). They also found a box containing a debugging device. (R2-73-284). The device was not connected to a telephone. (R2-73-286).

In another hall closet, officers seized a radio and two battery chargers. They seized a second radio and two sets of headsets from a closet in a spare bedroom. (R2-73-300, 302). They also discovered batteries, binoculars, and belts. (R2-73-303). They learned that the two radios did not operate together. (R2-73-308).

From the 1990 green pick-up truck

titled to Arlene Godwin, deputies seized a zip-lock bag, string, notes reflecting testimony taken at the drug trial of a Buddy Brunson, the box for a Titan .25 pistol, a roll of string, mothballs, a milk jug with purple material, a bow saw, a cooler containing Miracle-Gro fertilizer bags, two pieces of PVC pipe, a zip-lock bag containing twine, wire, ties and bags, and a brown paper bags with multiple plastic bags and two rolls of twine. (R2-73-330 through 341).

From the utility building, the deputies seized 34, 50 pound bags of Miracle-Gro; 4, 10 pound bags of Miracle-Gro; 4 sets of 3 milk jugs tied together (with some purple residue); rolls of camouflage-painted screen; bent metal rods; a bag with PVC pipe sections; metal rods; gloves; mothballs; several cans of spray paint; one hundred plant trays; some used trays; five sets of Easy-Gro Greenhouse; two sheets of

safety glazing; three balls of twine; two paint cans; wire screen and insecticide. (R2-73-349 through 358). They also discovered 27 bags of chemical hydrated lime; 18, 50 pound bags of slag; two four wheelers; and seed receipts for 700 pounds of Chufa, a seed planted for turkey hunting. (R2-73-362 through 371). According to the deputy who seized these items, all of them -- from the bags of Miracle-Gro to the bags of slag -- could be used for purposes other than the cultivation of marijuana. (R2-73-374).

In a carport, the deputies discovered a tractor, contained inside a trailer. (R2-73-360). The tractor had a tiller hooked to the back. (R2-73-361).

The day after the initial search the deputies returned and followed some tracks from across the dirt road in front of T. D. Godwin's residence and

discovered 4 additional trays of marijuana under a screen held down by two rocks approximately 150 yards northwest of T. D. Godwin's residence. (R2-72-107, 113). The marijuana was contained in the same kind of trench discovered the previous day. (R2-72-108). It contained three hundred forty-two plants. (R2-72-108). They also found a silver screen woven together on three sides, so that trays could be slid into it. (R2-72-109, 113). The trays containing these marijuana plants had the initials "SK" on white tabs contained in the trays. 14 trays were in the woven camouflage screen. No purple material, mothballs, or PVC pipe was found at this site. (R2-72-124).

The deputies also discovered many piles of what they suspected to be old marijuana stalks across the street from T. D. Godwin's residence. They also found bags and twine laced between the

trees, leading them to believe the area had been used to dry marijuana. (R2-73-315).

The government called a number of witnesses to explain the significance of the seized materials. For example, witnesses testified that two tractors ostensibly sold to a "Jack Gordon," receipts for which were discovered during the search, had in fact been sold to T. D. Godwin on December 15, 1987 for $6,782.11 in cash, and on June 22, 1989, for $8,468.34 in cash. (R2-73-393 through 394).

Another witness testified that Arlene Godwin had purchased two four-wheelers from him, one on June 21, 1990 for $2,400.00 cash and one on August 25, 1990 for $2,530.00 cash. He also testified that T. D. Godwin purchased a four-wheeler from him on August 22, 1990, for $2,730.00 cash and that T. D. Godwin requested to give him the cash in

private rather than at the business counter. (R2-73-402 through 405).

Automobile dealer representatives testified that Arlene Godwin purchased her pick-up truck for $18,394.20. (R2-74-423). During the course of the purchase, she asked how much cash she could pay without triggering the government reporting requirement and was advised that anything less than $10,000.00 would not have to be reported. (R2-74-422). She made two cash payments, totaling $9,999.20 and paid the remainder by check.[7] (R2-74-418, 424).

There was also evidence that T. D. Godwin had purchased his 1989 pick-up for $17,798.00 by trading in a 1986

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[7] The check was written from the account of J & K Trucking, a trucking company owned in part by Arlene Godwin's sister. (R2-73-440). Arlene Godwin borrowed $4,200.00 and deposited the other $4,195.00 into her sister's account, in order to write the check for $8,395.00. (R2-73-439-441).

pick-up and paying the difference -- $9,990.00 in cash. (R2-74-429 through 430). T. D. Godwin used his real name but indicated to the salesman he could only spend under $10,000.00, including his trade. (R2-74-432, 435).

A chemist testified that soil samples taken from each of the seed beds contained an insecticide with an ingredient known as carbofuran and that carbofuran is an active ingredient in Furidan -- the insecticide seized from T. D. Godwin's shed. (R2-74-460 through 461). He testified that the mothballs taken from T. D. Godwin's premises and from the seed beds both contained naphthalene. (R2-74-462). He further testified that the black pen taken from T. D. Godwin's residence was consistent with "AFG" writing on tabs contained on seed trays. (R2-74-465). He indicated that though carbofuran is purple (R2-74-418), the purple material taken from

Arlene green pick-up truck in the milk jug was grass seed. (R2-74-475, 477).

A hair fiber expert testified the twine taken from the suspected drying area was consistent with the twine seized from T. D. Godwin's pick-up truck. (R2-74-485 through 486).

A materials analysis expert testified that four kinds of paint were contained on the camouflage screens seized from the seed beds. (R2-74-496). More than ten kinds of paint were contained in cans taken from T. D. Godwin's outbuilding. (R2-74-496). The green and brown paints taken from the outbuilding matched the kinds of paint found on the screens located at the seed bed site spotted from the air. (R2-74-502). The red paint found in the outbuilding was consistent with paint found in the bed site located the day after the search of T. D. Godwin's residence. (R2-74-502). A drab green

paint was contained on the camouflage screens found at both sites, but no paint to match them was found at the residence or outbuilding. (R2-74-504).

A firearms and tool mark expert testified that two pieces of PVC pipe found in T. D. Godwin's outbuilding had been joined to the PVC pipe found in the seed bed site and that two other pieces of PVC pipe taken from T. D. Godwin's pick-up truck matched with pieces of PVC pipe taken from the seed beds. (R2-74-517).

A crime lab analyst, specializing in drug chemistry, identified three trace amounts found in the smoking bong and pipe as marijuana. (R2-74-540). He also identified vacuum cleaner contents as containing trace evidence of marijuana and the small amounts of matter taken from the match boxes and film holder as containing marijuana.

(R2-74-540 through 541). He also identified numerous other items found in various baggies, cans, and cigarettes as containing marijuana. (R2-74-538 through 541). He indicated that he was unable to analyze the stalks and could not say with certainty that they were marijuana. (R2-74-554). He indicated that the combined weight of all of the seedlings seized -- more than 10,000-- was less than one pound. (R2-74-548). He testified that he did not know whether the 18 pounds of seeds were germinable. (R2-74-550).

A crime lab analyst specializing in latent print analysis, testified that one of the marijuana bags from the utility room contained two fingerprints of Arlene Godwin, and that baggies in the hall closet bore the palm prints of T. D. Godwin. (R2-74-558 through 559). He also indicated that four sets of prints found on other baggies were

neither those of Arlene Godwin nor T. D. Godwin. (R2-74-568).

A fingerprint technician testified that Arlene Godwin's prints had been found on the two sheets of legal paper containing notes on the trial of Buddy Brunson. (R2-75-700 through 701). He also indicated prints of persons other than Arlene Godwin were found on the legal paper notes. (R2-75-704). He testified that two prints had been obtained from the marijuana trays, but neither matched either Arlene Godwin, T. D. Godwin or Buddy Brunson. (R2-75-705).

The government found the transmitter and recorder found at T. D. Godwin's premises to be operational when hooked to a telephone. (R2-75-721 through 722).

A deputy testified that he had discovered plexiglass sheets in T. D. Godwin's outbuilding and that he had

discovered a seed bed, two to three miles from T. D. Godwin's residence in January of 1990, which contained a sheet of plexiglass. (R2-75-735). He said that plexiglass could be used like a greenhouse in January to protect marijuana from cold weather. (R2-75-737).

The government also called two informants as witnesses. The first, Jeffery Jackson testified[8] in return for

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[8] Jackson said he met with T.D. Godwin through Buddy Brunson. (R2-74-576). He said that he had helped Brunson and T.D. Godwin tie up marijuana before an anticipated hurricane and that he had helped T.D. Godwin harvest marijuana. (R2-74-577 through 578).

He initially said that T.D. Godwin grew marijuana seedlings approximately one foot apart, but later said that he planted seedlings five to six inches apart. (R2-74-588). He testified that T. D. Godwin usually had 72 trays and claimed they tended the plants weekly, carrying fertilizer in jugs tied together. (R2-74-581, 583).

Jackson said he helped T. D. Godwin during 1985 and 1986 and quit in 1987. (R2-74-585). According to Jackson, he and T. D. Godwin tended it and Buddy Brunson sold it. (R2-74-585). He said

immunity and a favorable letter, to be written by the Assistant United States Attorney to prosecution authorities

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that he initially worked for $150.00-250.00 per week, but later made partner and made more than $100,000.00 per year. (R2-74-586). He also contended that T. D. Godwin said he buried his money. (R2-74-587).

According to Jackson, it takes three to four days to dry marijuana. He testified that his house and Arlene Godwin's house were used for the drying process. (R2-74-589). He also claimed that they used Arlene Godwin's house on 10 or 11 occasions, that she was allowed to take and sell what she wanted and that she received $25.00 per pound though he never actually saw her receive this money. (R2-74-589 through 591). He also claimed that he and T.D. Godwin packaged it, as did Arlene Godwin on occasion. (R2-74-592).

According to Jackson, the average yield of the marijuana they raised was 1-4 ounces per plant, sometimes 8 ounces per plant, and infrequently 1 pound per plant. (R2-74-598). He said a camouflage screen was never used and that chicken manure, rather than Miracle-Gro, was used for fertilizer. (R2-74-607). According to Jackson, T.D. Godwin never planted marijuana near his own house and, in his opinion, Godwin would never do so. (R2-74-611). Jackson said that they never used sophisticated equipment or radios, (R2-74-611), and that they never dug holes or trenches in which to grow marijuana. (R2-74-612).

regarding numerous pending felony battery charges for striking correction officers and police officers. (R2-74-575, 608). The second, Kenneth Lail, caught with marijuana plants in Opp, Alabama, agreed to "tell on his friends" and receive five years of probation.[9]

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[9] Lail said he worked as a farmer for T.D. Godwin's farm until T.D. Godwin bankrupted. (R2-74-633). He said in 1984 he discovered that T.D. Godwin was growing marijuana. (R2-74-634). Lail said that T.D. Godwin gave him some seeds, which he planted in his attic. (R2-74-636). Lail said that T.D. Godwin also bought fluorescent lights, which they used to grow 40 to 50 plants in Lail's attic, each up to 1 foot tall. (R2-74-636 through 638). Lail said he destroyed these plants, because the other informant, Jeff Jackson, had spread the word that he was growing it. (R2-74-640).

Lail also claimed he helped T.D. Godwin bag some marijuana in the fall of 1987 or 1988. (R2-74-641). Lail said that they filled 5 to 6 garbage bags full of marijuana and that T.D. gave him some "redbud" seed which he planted. (R2-74-641 through 644).

Lail also claimed that in 1984 and 1985 he heard T. D. Godwin discuss marijuana business with Buddy Brunson. (R2-74-645). According to Lail, T.D. Godwin said he made $300,000.00 one year. (R2-74-645).

(R2-74-658 through 659).

In the defense case, T.D. Godwin called his nephew and brother-in-law. They testified that T.D. Godwin planted seed plots to attract game for hunters (R2-75-754, 787), and that he used his tractor for this purpose. (R2-75-755). They testified that T.D. Godwin, known in Jay as "Buckshot" (R2-74-538), was an avid hunter and gun collector who had a reputation as "turkey hunter." (R2-75-755, 786). They testified that the type camouflage screen found in his utility building is a kind typically used to construct turkey and deer blinds. (R2-75-776).

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Lail claimed T.D. Godwin used Furidan and Miracle-Gro as fertilizer. (R2-74-647, 649). He testified that T.D. Godwin said he received $2,000.00 per pound for Afghan marijuana and that he had helped T. D. Godwin bag Redbud and Blue Hawaiian marijuana. Lail testified that the letters "AFG" were an abbreviation for Afghan marijuana, and the "RED" was for Redbud marijuana. (R2-74-659).

T.D. Godwin's brother-in-law, William Gandy, a school teacher, identified a gun safety book taken from T.D. Godwin's home, as belonging to T.D. Godwin's nephew, Stephen, a fourth grader at Jay Elementary School, the school at which Mr. Gandy was a teacher. (R2-75-805 through 806). Mr. Gandy explained that the school regularly teaches classes on gun safety because it is common for people in the Jay, Florida area both to carry pistols in their cars for target and snake shooting and to own shotguns and rifles for hunting. (R2-75-791 through 792, 805 through 806).

They both indicated they hunted regularly with T.D. Godwin. (R2-75-754). Mr. Gandy identified various rifles and shotguns as guns used regularly by T.D. Godwin to hunt. (R2-75-791). Both also identified numerous pictures, showing the interior of T.D. Godwin's residence and many items his

home reflecting his expertise and interest in turkey hunting.[10] (R2-75-798 through 800).

Arlene Godwin introduced testimony disclosing that her child, Stephen Bush, was driven to and from a residence separate from that of T.D. Godwin from October of 1990 through the first week of January, 1991. (R2-75-828 through 830). Her sister testified that she was living in a camper trailer at the site a home she was having built and storing her possessions in boxes in the carport at T.D.Godwin's residence. (R2-75-836 through 838).

During the trial court's review of its proposed jury charges, the defense sought lesser-included instructions for both counts I and II -- simple

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[10] During the government's case, its own witnesses attested to having seen the stuffed turkey and other game exhibits, as well as papers describing various hunting lodges, etc., connected with hunting. (R2-72-164, R2-73-199).

possession and conspiracy to possess. (R2-75-843 through 853). The trial court recognized that there was evidence of personal use, (R2-75-690, 847), but said that the addition of a lesser-included instruction on simple possession would render the charge and verdict forms unduly confusing. (R2-75-848). The trial court said that the charge and verdict form would be more understandable if the jury were merely given a choice of finding the guilty or setting them free. (R2-75-849). Accordingly, the trial court denied the defense request to charge on the lesser-included offense of simple possession, stating that it would add language instructing the jury that, if the government did not prove possession with intent to distribute or manufacturing more than 1,000 plants, the jury would be required to find the defendants not guilty. (R2-75-853). Citing both this

Court's decision in Beck v. Alabama, 447 U.S. 625 (1981) and the Eleventh Circuit's decision in Wiggerfall v. Jones, 918 F.2d 1544 (11th Cir. 1990), defense counsel objected to the trial court's refusal to give these lesser-included charges. (R2-75-853). However, the trial court said it would not charge on simple possession, (R2-75-855), and did not do so. (Court's Exhibit 1 - Court's Instructions to the Jury).

Arlene Godwin's trial counsel argued to the jury:

> The Judge is going to tell you if you don't find these people guilty of what they're charged with, if you don't believe they possessed with intent to sell, if you don't believe they were cultivating marijuana, then you got to find them not guilty. Personally, I was in this courtroom everyday, I'm going to be amazed if you find somebody not guilty of everything in light of all this. The government knows that, too, because they know you're going to be wrestling with how you can justify

> finding these people not guilty, I really don't think they proven this, what they charged them with, but I have no other choice, and I know that somebody is involved in this is a big marijuana dealer, I can tell that, although I'm not sure if they've convicted them with what they're charged with, how can I justify letting them go?
>
> It's not your fault. You're not the ones that formulated these charges and it would be a good signal for you to give the government that they need to be a little bit more circumspect about what they're doing instead of all this overkill....

(R2-75-905 through 906).

> Possession with intent to distribute means exactly that, you've got to possess it with intent to transfer to somebody else. It hasn't been suggested or even argued that Arlene Godwin brought these two plastic bags of pot to the house. There's no proof in her vehicle that she did.

(R2-75-915-916).

A special verdict form was submitted to the jury and the jury indicated its findings that Arlene Godwin and T. D. Godwin were guilty of

everything. On October 31, 1991, the trial court held an evidentiary hearing to consider evidence regarding the weight of the marijuana seized by law enforcement officers. A crime lab analyst for the Florida Department of Law Enforcement testified that the 10,451 seedlings weighed approximately 10 ounces, (R2-71-4 through 6), and that the remainder of marijuana seized weighed approximately 6.8 kilograms (15 pounds). (R2-71-7). He described the seedlings as ranging from two to five inches tall. (R2-71-10).

Dr. Mahmoud L. El Sohly testified as an expert regarding the cultivation of marijuana. (R2-71-12 through 13). Dr. El Sohly related the results of two federal studies he conducted regarding the growth of marijuana -- one conducted in 1985 and 1986, and another conducted in 1990 and 1991. (R2-71-24, 46 through 47, 54 through 56). In both studies,

the marijuana plants were grown under ideal conditions. (R2-71-37). Under these ideal conditions, the average yield of the marijuana plants in the 1985-1986 study was 1/4 kilogram (1/2 pound). (R2-71-37). Even under these ideal conditions, 10% of the plants were lost. (R2-71-40). In the 1990-1991 study, Dr. El Sohly changed the spacing of the marijuana from three feet apart (9 square feet) to approximately nine feet apart (81 square feet). (R2-71-54 through 55). He found that the average yield increased from 1/4 kilogram to over 1 kilogram (2.2 pounds). (R2-71-55 through 58).

Dr. El Sohly testified that growing marijuana in a Florida pine forest, as in this case, would constitute less than ideal conditions. (R2-71-37). According to Dr. El Sohly, the marijuana would grow tall but not bushy, and, as a result, each plant could be expected to

yield less than 1/2 pound of marijuana. (R2-71-38 through 39). Dr. El Sohly related that a number of variables -- such as irrigation, fertilization techniques, the frequency of tending, spacing, topping, the variety grown, and the length of growing season -- must be taken into account in attempting to predict the yield of a marijuana plant. (R2-71-57 through 61). In his expert opinion, there are too many variables to generalize the average yield of one marijuana plant. (R2-71-59).

The trial court concluded that Dr. El Sohly's testimony provided a rational basis for the presumption that, when more than 50 plants are involved, for sentencing purposes, each plant is the equivalent of 1 kilogram of marijuana. (R2-71 through 76). Though the trial court indicated doubts whether the small seedlings involved in this case constituted "plants," it nevertheless

applied the one kilogram presumption. (R2-2-77 through 78). Though the amount involved totaled 10,457.8 kilograms (10,451 plus 6.8 kilograms of marijuana), the trial court discounted the number of plants by 10% -- the percentage of plants that Dr. El Sohly explained were lost in his studies under ideal conditions -- and sentenced the defendants on Counts I and II at Level 34 (3,000 to 10,000 kilograms) rather than at Level 36 (10,000 to 30,000 kilograms). (R2-71-77 through 78).

REASONS FOR GRANTING THE WRIT

1. This case presents an important federal sentencing issue of whether there is a rational basis for the fifty plant trigger of U.S.S.G. 2D1.1 which has been decided incorrectly by the Eleventh Circuit and which should be resolved by this Court.

U.S.S.G. 2D1.1 provides:

> In the case of an offense involving marihuana plants, if the offense involved (a) 50 or more marihuana plants, treat each plant as equivalent to 1 KG if marihuana; (B) fewer than 50 marijuana plants, treat each plant as equivalent

> to 100 G of marijuana. Provided, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.

(Effective November 1, 1990).[11]

The District Court and Eleventh Circuit rejected Petitioner's argument that there was no rational basis for Section 2D1.1. Other challenges to the constitutionality of Section 21D1.1 have also been rejected by the Eleventh and other Circuits. See, United States v. Osburn, 955 F.2d 1500 (11th Cir. 1992)(hereinafter "Osburn"); United States v. Lee, 957 F.2d 778 (10th Cir.1992); United States v. Belden, 957 F.2d 671 (9th Cir. 1992); United States v. Smith, 961 F.2d 1389 (8th Cir. 1992); United States v. Webb, 945 F.2d 967 (7th Cir. 1991); United States v. Holmes,

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[11] This provision appears below the Drug Quantity Table, marked by an asterisk. Though the 1991 Guidelines, effective November 1, 1990, applied to this case, this provision went into effect on November 1, 1989 with the enactment of the 1990 Guidelines.

961 F.2d 599 (6th Cir. 1992)(hereinafter "Holmes"); United States v. Underwood, 970 F.2d 1336 (4th Cir. 1992). This Court has not addressed the constitutionality of Section 2D1.1 and its 50 plant trigger. Petitioner asserts that the resolution of this question by the Courts of Appeals deviates from a strict application of the rational basis test previously enunciated by this Court.

Under a "rational basis" test, the reviewing court's role "must be restricted to the issue of whether any state of facts either known or which could reasonably be assumed affords support for 'the questioned legislated judgment.'" United States v. Carolene Products Co., 304 U.S. 144, 154 (1937).

The Guideline provision here in question is driven by 21 U.S.C. 841(b)(1)(A)(vii) which provides that an

individual convicted under 21 U.S.C. 841(a) "shall be sentenced to a term of imprisonment which may be not less than 10 years if the case involved 1,000 or more marijuana plants." Thus, a minimum ten year sentence is triggered by 1,000 or more marijuana plants. In contrast, U.S.S.G. 2D1.1's 1 kilogram ratio is triggered whenever 50 or more plants are involved.

For the most part, the decisions of the various Courts of Appeals concerning the constitutionality of Section 2D1.1 have focused on whether there is a rational basis for the equivalency ratio rather than the 50 plant trigger. See, United States v. Lee, 957 F.2d 778 (10th Cir.1992); United States v. Belden, 957 F.2d 671 (9th Cir. 1992); United States v. Smith, 961 F.2d 1389 (8th Cir. 1992); United States v. Webb, 945 F.2d 967 (7th Cir. 1991); United States v. Underwood, 970 F.2d 1336 (4th Cir. 1992). The

Eleventh Circuit and Sixth Circuit have gone on conclude that there is a rational basis for the 50 plant trigger. Osburn, 955 F.2d 1500 (11th Cir. 1991); Holmes, 961 F.2d 599 (6th Cir. 1992). The Eleventh Circuit posited that "...Congress could have rationally chosen the current penalty scheme to halt the problem earlier in the cycle, making it less likely that the drug would ever be distributed to the public," Osburn, 955 F.2d at 1507. Petitioner submits that these holdings have attributed too much to potential intentions of Congress, rather than to the intentions of the Sentencing Commission, which came up with the 50 plant trigger to the 1,000 gram equivalency ratio in 1989.

Congress dealt with "50" marijuana plants through its 1986 and 1988 amendments to 21 U.S.C. Section 841(b)(1)(D). In 1986, through Pub. L.

99-570, Section 1000 (a)(1)(c), it inserted "except in the case of 100 or more marijuana plants regardless of weight," after "50 kilograms of marijuana." In 1988, it amended the statute again, through Pub. L. 100-690, Section 6479 (3), by substituting "50 or more marijuana plants" for "100 hundred or more marijuana plants."

The Sentencing Commission did not come up with the 1,000 gram per plant ratio until November 1, 1989, when the 1990 Sentencing Guidelines took effect. Prior to that, the Sentencing Guidelines were silent on both 50 or more marijuana plants and the 1,000 gram equivalency ratio.

There is no legislative history supporting the supposition that Congress chose "the current penalty scheme to halt the problem earlier in the

cycle."[12] With no supporting legislative history and no evidentiary support in the record addressing the question, there is nothing in this record or elsewhere to suggest what "could reasonably be assumed" was Congress' or, for that matter, the Sentencing Commission's intention.

In this case, the government presented no evidence disclosing some rational basis for the selection of fifty plants as the trigger for enhanced sentencing, rather than some higher or lower number. Whereas the 1,000 plant trigger used in the statute has a legislative history which discloses that it was designed to snare large marijuana

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12 See, Section Analysis of Judiciary Committee issues in H.R. 5210, 134 Cong. Rec. S 17360, S 17368 (Daily ed. Nov. 10, 1988)(comments of Sen. Biden)(Congress was interested in eliminating defense and prosecution arguments debating what constitutes "usable" marijuana).

operations,[13] there is no indication in the Sentencing Guidelines of any basis for a distinction between those who grow less than or more than 50 marijuana plants. Moreover, there is no evidence in this record indicating that possession of 50 or more marijuana plants distinguishes large from small scale operations.

In this case, the Eleventh Circuit upheld the District Court's holding that testimony regarding recent developments in marijuana cultivation provided a rational basis for the 1,000 gram ratio. However, the holding overlooked two important points.

First, even though Dr. El Sohly's recent 1991 study revealing that a marijuana plant, under ideal conditions, could yield more that one kilogram of marijuana, may provide a rational basis

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[13] See, HR Rep. No. 99-845, Pt. 1 at 12, 17.

for prospective implementation of the 1,000 gram ratio, the results were unknown at the time the Guideline provision was enacted. Moreover, the results were still unanticipated as Dr. El Sohly's previous testimony in the Osburn case, also decided in 1991, which led the District Court in that case to conclude that no one would anticipate that one marijuana plant could yield more than one kilogram of marijuana. Thus, the results of Dr. El Sohly's studies have no bearing on the legal question of whether there was a rational basis, at the time the Sentencing Commission came up with the 1,000 gram ratio.

Second, the study has no impact upon whether there is a rational basis for triggering the 1,000 gram ratio when 50 or more plants are involved.

Petitioner submits that the record and legislative history reflect no

rational basis for the Sentencing Commission's decision to trigger the 1,000 gram equivalency ratio at the 50 plant level. Petitioner accordingly asserts that the Eleventh Circuit has improperly decided this question.

The impact of the 50 plant trigger has a profound impact in federal sentencing. The question of whether there is a rational basis for the 50 plant trigger will surely be raised in other cases. This Court should resolve the question.

2. The decision of the Eleventh Circuit in this case is in conflict with F.R.Cr.P. 31(c), lesser included offense and theory of defense instruction requirements, and due process.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that a "defendant may be found guilty of an offense necessarily included in the offense charged." A lesser offense is included within the charged offense if all the elements of the lesser offense

are also elements of the offense for which the defendant stands charged. Schmuck v. United States, 489 U.S. 705 (1989) (hereinafter "Schmuck"). A defendant is entitled to a lesser included offense instruction if the evidence would permit a jury to rationally find her guilty of the lesser offense and acquit of the greater. Keeble v. United States, 412 U.S. 205 (1973) (hereinafter "Keeble"). Further, it is well settled that an accused "is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." United States v. Alvarez-Moreno, 874 F. 2d 1402, 1413 (11th Cir. 1989), quoting, United States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986) (emphasis in original). In this case, the trial court's failure to

give requested lesser-included-offense instructions for the offenses of simple possession and conspiracy to simply possess ran afoul of Rule 31(c), the lesser included offense and theory of defense instruction requirements, and due process requirements of the Fifth Amendment to the United States Constitution.

Both Counts I and II referenced 21 U.S.C. 841(a)(1) which provides, in pertinent part, that: "[i]t shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, dispense, a controlled substance." With respect to Count II, the trial court instructed the jury that it could find Arlene Godwin guilty of either manufacturing marijuana or possessing it with intent to distribute it or guilty of both.

21 U.S.C. 841(a)(1), requires knowing or intentional "possession" as an element of possession with intent to distribute. 21 U.S.C. 844(a) similarly prohibits knowing or intentional "possession" of a controlled substance. Simple possession has been widely recognized as a lesser-included offense of possession with intent to distribute. See, e.g., United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983); United States v. LoRusso, 695 F.2d 45 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983)(hereinafter "LoRusso"); Guam v. Rosario, 625 F.2d 811 (9th Cir. 1979). Here, because there was a dispute as to the establishment of intent to distribute -- the element required for proof of the greater but not the lesser offense -- a lesser-included-offense charge was required if either party requested it. LoRusso, 695 F.2d at 52, n.3.

This Court, in Keeble, 412 U.S. 205, identified the risk which results when a trial court fails to give a lesser-included-offense charge when "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit of the greater," United States v. Garcia-Duarte, 718 F.2d at 47, quoting, Keeble v United States. "Where the jury suspects that the defendant is plainly guilty of some offense but one of the elements of the charged offense remains in doubt, in the absence of the lesser offense instruction, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction." Schmuck, 489 U.S. at 717, n.9. citing, Keeble, (emphasis in original). Arlene Godwin was subjected to that risk in this case.

To be sure, there was abundant evidence supporting the government's

contention that she participated in the manufacturing of marijuana or possessed it with intent to distribute it. But, there was also evidence of simple possession for personal use. The trial court recognized this in stating during a charge conference "let me say to both defendants that there is evidence of personal use, there is no question about that."[14] (R2-75-847). For example, there was evidence of a smoking bong, pipe, rolling paper, a rolled marijuana cigarette found in the living room and marijuana residue found in various places. Though this evidence may have been "weak, insufficient, inconsistent, or of doubtful credibility," by the trial court's own admission, it did

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[14] The trial court made a similar remark recognizing such evidence in the trial: "[w]ell, I think you may be entitled to an instruction of simple possession by virtue of all the evidence of just plain old marijuana use that seems to floating around here." (R2-74-690).

exist. Thus, there was a "foundation in the evidence" for an instruction on simple possession. Moreover, Ms. Godwin's theory of defense was to admit guilt of simple possession but not guilt of the more serious charges.

The trial court's refusal to give the lesser-included instruction put the defense in an "all or nothing" position. And, the trial court gave the jury an all or nothing choice warned against by this Court in Keeble.

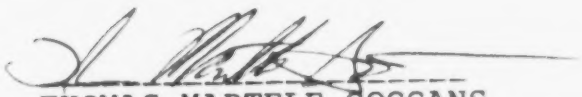
The jury was sure to believe was she was guilty of something. Her trial counsel acknowledged as much to the jury. To be sure, a special verdict form was submitted to the jury and the jury indicated its findings that Arlene Godwin was guilty of everything. Though there were alternative theories under which Arlene Godwin could have been found guilty of violating 21 U.S.C. 841(a)(1), as a practical mater it made

no difference to her fate under which theory she was found guilty. But, because the trial court gave the jury an all or nothing choice, the jury may have failed "to give effect to the reasonable doubt standard, resolving its doubts in favor of conviction," Schmuck, 489 U.S. at 717 n.9, quoting, Keeble, with the theory or theories of guilt being irrelevant to its decisional process.

Because, as was recognized by the trial court, there was a foundation in the evidence for Arlene Godwin's requested lesser included charges, the trial court's failure to give lesser included offense instructions violated Rule 31(c), the lesser included offense and theory of defense instruction requirements, and due process.

## CONCLUSION

For the foregoing reasons, Petitioner Arlene Elizabeth Godwin submits that the petition for writ of certiorari should be granted.



THOMAS MARTELE GOGGANS
P.O. Box 1307
Montgomery AL 36101
(205)-834-2511

Attorney for Petitioner
Arlene Elizabeth Godwin

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 91-4099

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D. C. Docket No. 91-3018-01-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

THARON DALE GODWIN, a/k/a
T. D. GODWIN, a/k/a
"BUCKSHOT", ARLENE ELIZABETH
GODWIN,

Defendants-Appellants.

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Appeals from the United States District Court

for the Northern District of Florida

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(January 25, 1993)

Before FAY, Circuit Judge, GODBOLD and RONEY*, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir Rule 36-1.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v. Case No. 91-03018-RV

THARON DOUGLAS GODWIN and
ARLENE ELIZABETH GODWIN

ORDER

The issue in this case is whether there is a constitutional "rational basis" for treating 1,000 marijuana plants as the equivalent to 1,000 kilograms or marijuana for statutory and sentencing guideline purposes. See United States v. Carolene Land Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1937); Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934). On May 17, 1991, after a jury trial, the defendants

in this case were found guilty of marijuana offenses. Sentencing was originally held on July 23, 1991, but was continued in order to allow the defendants to further develop evidence regarding the production of marijuana plants and the yield of useable and marketable marijuana. An evidentiary sentencing hearing was held on October 31, 1991, and additional evidence was presented. Testifying were Donald Robert Walker, Senior Crime Lab Analyst at the Florida Department of Law Enforcement Laboratory in Pensacola, and Dr. Mahoud A. ElSohly, currently the Project Director of the National Institute on Drug Abuse Marijuana Project at the University of Mississippi. For the reasons stated herein, the defendant's constitutional

challenge to portions of Title 21, United States Code, Section 841(b)(1), and Section 2D1.1 of the United States Sentencing Commission Guidelines is DENIED.

I. Discussion

The defendants, Tharon Douglas Godwin and Arlene Elizabeth Godwin, were charged by a three-count indictment with: (1) conspiracy to knowingly and intentionally manufacture 1,000 or more marijuana plants and to possess with intent to distribute a controlled substance in violation of Title 21, United States Code, Sections 841(a)(1) and 846; (2) knowingly and intentionally manufacturing 1,000 or more marijuana plants and possessing with intent to distribute a controlled

substance in violation of Title 21, United States Code, Section 841(a)(1); and (3) knowingly or intentionally carrying or using firearms during and in relation to a drug trafficking case, for which they could be prosecuted in a court in the United States, in violation of Title 18, United States Code, Section 924(c)(1). After a seven day jury trial in this court, the defendants were found guilty on all counts. Sentencing was initially scheduled for, and held on, July 23, 1991. On that date, this Court brought to the counsel's attention that the Osburn and Lee cases, discussed infra, and the defendants raised the constitutional objections which are addressed herein. Sentencing was continued until October 31, 1991, in order to allow the defendants an

opportunity to develop to develop and present evidence on the issue, and the parties were also given the opportunity to submit written legal memoranda.

At the time of the defendants' arrests, law enforcement officers from the Santa Rosa County, Florida, Sheriff's Department seized 10,451 marijuana plants, all in seed trays, and in the early stages of growth in four separate seedbeds. The plants ranged in size from about two inches to about five or six inches in height.

Law enforcement officers also seized a large number of black plastic trays. Evidence presented at trial indicated that these trays were consistent with those used as seedbeds for marijuana seeds prior to transplanting them as seedlings in other

areas. The evidence indicated that the defendants had about 1700 pounds of Miracle Grow fertilizer, tillers, camouflage screening, P.V.C. pipe, insecticides, etc., indicating a rather large and sophisticated marijuana growing operation. Law enforcement officers also discovered approximately 3 kilograms of various varieties of marijuana seeds, and approximately 4 kilograms of marketable marijuana, much in ounce-quantity bags. The marijuana varieties included those known in the trade "Blue Hawaiian," "Afgan," "Skunk," "Redbud," and "Black Columbian." At the time of sentencing, the Presentence Report indicated that the total quantity of marijuana utilized for offense level purposes under the guidelines was 10,457.8 kilograms, based on 10,451

plants and 1 kilogram per plant and the additional 6.8 kilograms of marijuana found. Offenses involving between 10,000 and 30,000 kilograms of marijuana have a base offense level of 36.

It is well established that Acts of Congress are reviewed by the courts on a standard of whether the legislative judgement had a "rational basis" and was not arbitrary or discriminatory. See Carolene Products Co. and Nebbia, supra. The guidelines promulgated by the United States Sentencing Commission are also subject to the same standard of review. "The authority to define and fix the punishment for felony convictions is purely a matter of legislative prerogative." United States v. Hatch, 925 F.2d 362, 363 (10th Cir. 1991) (quoting United States v.

Goodface, 835 F.2d 1233, 1236 (8th Cir. 1987)). When a statute does not discriminate on racial grounds or against a suspect class, Congress' judgment will be sustained in the absence of persuasive evidence that Congress had no reasonable basis for drawing the lines it did. United States v. Solomon, 848 F.2d 156, 157 (11th Cir. 1988); United States v. Holmes, 838 F.2d 1175, 1177 (11th Cir. 1988). Thus, a court need only find that Congress had a rational basis for the choice of penalties. Chapman v. United States, 500 U.S. ____, 111 S.Ct. 1919, 1927, 114 L. Ed. 2d 524, 538 (1991).

A. Actual Weight of Contraband Is Irrelevant. Title 21, United States Code, Section 841(b)(1)(A)(vii) requires a ten-year mandatory minimum sentence,

with a maximum of life, for offenses involving "1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1000 or more marijuana plants regardless of weight." 21 U.S.C. Section 841(b)(1)(A)(vii). The defendants argue that the actual weight of all the 10,451 confiscated plants did not exceed one pound. If only the actual weight of the confiscated marijuana is used, the statute provides for a maximum sentence of five years, and no minimum mandatory sentence. See, 21 U.S.C. Section 841(b)(1)(D). Thus, resolution of the issue in this case has a major effect on the defendants' sentencing. However, the plain language of this provision indicates that the applicability of the ten-year mandatory minimum provision to

offenses involving marijuana plants is determined by the number of plants, not by their weight.[1] See United States v. Eves, 932 F.2d 856, 856 (9th Cir. 1991) ("The number of plants determines the mandatory minimum sentence of imprisonment in a conviction for possession with intent to distribute").

Furthermore, the legislative history of Section 841(b)(1)(A)(vii) makes it clear that in enacting a mandatory minimum sentencing provision based solely on the number of plants possessed by the defendant, Congress "'intended to punish growers of

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[1] This provision is part of a scheme of graduated penalties for those convicted of marijuana cultivation, whose penalties are prescribed based on the number of plants involved, with breakpoints at 50 plants, 100 plants, and 1,000 plants. See 21 U.S.C. [Section] 841(b)(1)(A)-(D).

marijuana by the scale of potential of their operation and not just by the weight of the plants seized at a given moment'." United States v. Eves, supra, 932 F.2d at 859 (quoting United States v. Fitol, 733 F.Supp. 1312, 1315 (D. Minn. 1990)). The Senate Judiciary Committee's report regarding the applicable provision of the Anti-Drug Abuse Act of 1988 directly addresses why:

> Section 841(b)(1)(A) provides for a mandatory minimum 10 year penalty for distribution, or possession with intent to distribute, of "1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana." Defendants charged with possessing large quantities of marijuana plants have argued that the statutory definition of marijuana plants specifically excludes seeds and stems of the plant, and that therefore these items may not be counted toward that 1,000 kilogram requirement.

The government has argued in response that the term "mixture or substance" encompasses all parts of the plants as harvested, notwithstanding the statutory definition of "marijuana," but defendants contend that the "mixture or substance" language applies only to marijuana after it has been prepared for illegal distribution. The defendants' position has been adopted by at least one court. United States v. Miller, 680 F.Supp. 1189 (E.D. Tenn. 1988).

The amendment is intended to curtail this unnecessary debate by providing that the minimum penalty is triggered either by the weight of the "mixture or substance" or by the number of plants regardless of weight. The bill uses 1,000 plants as the equivalent of 1,000 kilograms.

Section Analysis of Judiciary Committee issues in H.R. 5210, 134 Cong. Rec. S17360, S17368 (daily ed. Nov. 10, 1988)(comments of Sen. Biden). (emphasis added)

Therefore, as a preliminary matter,

I find that Congress has expressly provided for an enhanced, 10-year minimum sentence for "1,000 or more marijuana plants regardless of weight." The actual weight of the plants is irrelevant under the statute. United States v. Bradley, 905 F.2d 359 (11th Cir. 1990).

B. Section 841(b)(1)(A)(vii) and Sentencing Guideline 2D1.1 are not Unconstitutional. The Defendants have challenged the constitutionality of both Section 842(b)(1)(A)(vii) and Sentencing Guideline 2D1.1. Section 2D1.1 of the (1991) Sentencing Guidelines provides:

> In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the

> actual weight of marihuana is greater, use the actual weight of the marihuana.
>
> [Section] 2D1.1 at 2.47, n.*. (Manual effective 11/1/90)

The defendants argue that there is no rational basis for Congress' selection of one thousand plants as a trigger for the enhanced, ten years to like, sentencing and the application of the mandatory sentencing provisions contained in Title 21. United States Code, Section 841(b). According to the defendants, there is also no rational basis for the treatment by the Drug Quantity Table in Section 2D1.1(c) of the Sentencing Commission Guidelines making one marijuana plant equivalent to one kilogram of marijuana. Therefore, the defendants argue, these proportions of both the statute and the sentencing

guidelines are arbitrary and unconstitutional in application, and deny the defendants due process and equal protection, contrary to the Fifth and Fourteenth Amendments to the United States Constitution. (See documents 56, 58).

In support of their argument, the defendants rely upon United States v. Osburn, 756 F.Supp. 571 (N.D. Ga. 1991), in which the court held that Sentencing Guideline 2D1.1 was unconstitutional to the extent that the guidelines equated one marijuana plant with one kilogram of marijuana for plants in groups of 50 or more. The defendants also cite United States v. Lee. 762 F. Supp. 306 (D.Kan 1991), which held unconstitutional the application of the minimum mandatory sentencing contained in Section 841(b)

on the grounds that the selection of one hundred plants for the 5-year minimum mandatory sentence enhancement purposes (as the equivalent of 100 kilograms) was without a rational basis.

I also note that United States v. Streeter, 907 F.2d 781 (8th Cir. 1990) held that, prior to being amended, the sentencing guidelines were unconstitutional to the extent that one marijuana plant equated 100 grams in cases involving less that 50 plants, since the underlying statute required the actual weight of the plants to be used in cases of less that 50 plants.

(1) Newly Developed Data. In light of the evidence presented in this case, I must respectfully disagree with the reasoning of the Lee and Osburn courts. In Osburn, the court relied

upon the testimony of Mahoud A. ElSohly, who also testified in this case. In Osburn, as in this case, Dr. ElSohly testified regarding a two-year study he had undertaken to determine the average weight of usable marijuana produced by a cannabis plant. His study involved both Mexican and Columbian varieties of long maturity. The plots of marijuana were well fertilized and irrigated. Using the Mexican variety at stages of maturity from 12 to 21 weeks, Dr. ElSohly's plants averaged a usable marijuana yield of 222.37 (.2 kilograms). [See Table 1, attached.] Using only mature plants, the Columbian variety averaged a bit higher, at 273.7 grams of usable marijuana. [See Table 2, attached.] In the Osburn hearing, Dr. ElSohly testified that he had never

seen or grown a plant in which produced as much as one kilogram (or 2.2 pounds) of marketable marijuana, and that, even under ideal conditions, he would not expect any marijuana to yield an average of one kilogram per plant.

Both the Osburn and Lee decisions were based on the absence of any evidence to indicate that a marijuana plant, even under the optimum conditions, can yield one kilogram of dry marijuana leaves. Such is not the case here.

In this case, the defendants also called Dr. ElSohly as an expert witness in the area of marijuana cultivation. However, Dr. ElSohly testified that, after being a witness in the Osburn case, he undertook another study to experiment with other growing factors to

determine whether a yield of one kilogram per plant was possible. The prior study had been based on 36-inch rows and a 36-inch plant spacing, or nine square feet per plant. In these studies, Dr. ElSohly varied the distances between the rows of plants and the spacing of the plants themselves and discovered that increased spacing resulted in increased yield of usable marijuana. [See Tables 3 and 4, attached.] Indeed, when the plants harvested by Dr. Elsohly in 1990 had been allocated 81 square feet (planted 9 feet apart, with 9 feet row spacing), they yielded up to 1011 grams. In the 1991 tests, plant having 72 square feet of growing area averaged 1152 grams (2.5 pounds). [See Table 4, attached.]

Based on Mr. ElSohly's most recent

research and his testimony regarding the results of this research, I conclude that it is quite possible to produce one kilogram of dry usable marijuana from one marijuana plant. Accordingly, there is a rational basis for the use of that equivalency in both the statute and the guideline,a nd there is no constitutional infirmity.[2]

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[2] Dr. ElSohly's testimony also addressed the question of when is a seedling a "plant" for purposes of the statute and guideline. Clearly, a sprout that is barely more than a germinated seed can be called a plant, but that hardly seems to be a reasonable construction of what Congress and the Sentencing Commission had in mind. He testified that under ideal conditions, with each seedling having its separate container, about 10% would not survive. If transplanting from seed trays containing several hundred seedlings, ranging in size from about 2 inches to 6 inches in height, the loss rate would probably be considerably greater because the root separation difficulty, with attendant breakage and bruising of the seedlings. Therefore, I applied a 10% reduction to the 10,451 seedlings to

(2) Congressional Policy. Another reason for upholding the statute and sentencing guideline in question does not depend on evidence that one plant's usable product could weigh in excess of one kilogram.

The Supreme Court of the United States has recognized that there is no constitutional requirement that penalties for drug offenses reflect different defendants' "individual degrees of culpability." Chapman, supra, 500 U.S. at ---, 111 S.Ct. at 1928, 114 L.Ed. 2d at 539. I find that there is a rational basis for the distinction made between those convicted of growing less than 50 plants and those

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arrive at a net of 9,406 "plants" for sentencing purposes. This, in my judgment, more closely approximates what would actually be the plants with some expectation of growing in a field.

convicted of growing in excess of 50 plants, regardless of whether one plant can produce one kilogram - or more usable product. "Setting punishment on the basis of the number of plants is not arbitrary or irrational. In general, more plants can create more marijuana. Setting a fixed punishment per plant negates the need for complicated hearings to determine the potential yield of a given plant." United States v. Sousa, 940 F.2d 670 (9th Cir. 1991) (Text available on Westlaw). See also United States v. Motz, 936 F.2d 1021, 1025 (9th Cir. 1991) ("There is no constitutional requirement that the penalty for an offense involving one marijuana plant be equal to the penalty for an offense involving the quantity of dried marijuana the plant would yield.")

Congress and the Sentencing Commission apparently perceived a greater treat posed by those who produce marijuana on a much larger scale. As noted by the Supreme Court of the United States, "[t]he penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level." Chapman v. United States, 500 U.S. ____, 111 S.Ct. 1919, 114 L.Ed. 2d 524, 538 (1991). See also HR Rep. No. 99-845, Pt. 1 at 12, 17. Thus, the high mandatory minimum sentences for larger scale growers who are caught with over 50, or over 100, or over 1,000 plants reflect Congress' and the Sentencing Commission's view towards the seriousness of the offenses, not a scientific and precise determination

that one plant was capable of producing one kilogram of marijuana.

DONE AND ORDERED this 26 day of November, 1991.

/s/ Roger Vinson
ROGER VINSON
United States District Judge

Table 1. Statistics for the Production of Marijuana from Plants of Different Age

| | | WET WEIGHT(g) | | | DRY WEIGHT(g) | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Plant # | Whole Plant | Stalk/ Stems | leaves | Stalk/ Stems | leaves | % of dry leaves to Dry WP | % of dry leaves to Wet WP | % of dry stalk/stem to Wet WP | % of Dry plant to Wet WP | % of wet leaves to Wet WP | % of wet stalk/stem to Wet WP | % of dry leaves to Wet leaves | Height (cm) |
| 12 | 1 | 329 | 182 | 146 | 82 | 53.5 | 39 | 16 | 25 | 41 | 45 | 55 | 37 | 180 |
| 13 | 2 | 1309.7 | 702 | 607.7 | 780 | 130.5 | 26 | 10 | 29 | 39 | 46 | 56 | 21 | 231 |
| 14 | 3 | 1055 | 657 | 398 | 282 | 158.8 | 36 | 15 | 28 | 42 | 38 | 62 | 40 | 269 |
| 15 | 4 | 2163 | 1197 | 966 | 623 | 372.5 | 37 | 17 | 29 | 46 | 45 | 55 | 39 | 296 |
| 16 | 5 | 2222 | 1518 | 704 | 726 | 241.0 | 25 | 11 | 33 | 43 | 32 | 68 | 34 | 224 |
| 17 | 6 | 2268 | 1533 | 735 | 823 | 268.2 | 25 | 12 | 36 | 48 | 32 | 68 | 36 | 281 |
| 8 | 7 | 1222 | 1331 | 691 | 655 | 221.5 | 25 | 11 | 33 | 44 | 33 | 67 | 33 | 309 |
| 10 | 8 | 1726 | 1278 | 446 | 668 | 171.4 | 20 | 10 | 39 | 49 | 26 | 71 | 38 | 328 |
| 20 | 9 | 1472 | 2535 | 937 | 1220 | 388.7 | 24 | 11 | 35 | 46 | 27 | 73 | 41 | 259 |
| 21 | 10 | 2164 | 1661 | 503 | 954 | 217.6 | 20 | 10 | 39 | 50 | 23 | 77 | 43 | 358 |
| Average | | 1867.27 | 1259.4 | 608.37 | 630.9 | 323.37 | 27.7 | 12.3 | 33.6 | 44.8 | 36.7 | 65.4 | 36.3 | 271.6 |

* Whole Plant

26b

Table 2. Statistics for the Production of Marijuana from Mature Plants

| Plant # | WET WEIGHT(g) Whole Plant | Stalk/ Stems | Leaves | DRY WEIGHT(g) Stalk/ Stems | Leaves | % of dry leaves to Dry WP | % of dry leaves to Wet WP | % of dry stalk/stem to Wet WP | % of Dry plant to Wet WP | % of wet leaves to Wet WP | % of wet stalk/stem to Wet WP | % of dry leaves to Wet leaves | Height (cm) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 3769 | 2635 | 1261 | 1456 | 709 | 33 | 18 | 37 | 56 | 32 | 73 | 56 | 269 |
| 2 | 2680 | 1620 | 1060 | 688 | 381 | 36 | 14 | 26 | 39 | 48 | 61 | 36 | 331 |
| 3 | 1713 | 1200 | 513 | 620 | 181 | 23 | 11 | 36 | 47 | 39 | 70 | 35 | 213 |
| 4 | 2133 | 1292 | 841 | 680 | 289 | 33 | 14 | 32 | 45 | 39 | 61 | 34 | 316 |
| 5 | 1730 | 1218 | 512 | 570 | 171 | 33 | 10 | 33 | 43 | 38 | 79 | 33 | 221 |
| 6 | 2344 | 1314 | 1030 | 621 | 319 | 31 | 14 | 27 | 48 | 44 | 56 | 31 | 333 |
| 7 | 2283 | 1541 | 742 | 810 | 140 | 19 | 6 | 36 | 43 | 33 | 68 | 19 | 257 |
| 8 | 2231 | 1418 | 813 | 734 | 280 | 28 | 13 | 33 | 48 | 36 | 64 | 34 | 326 |
| 9 | 1168 | 808 | 360 | 400 | 130 | 25 | 11 | 34 | 45 | 31 | 69 | 36 | 324 |
| 10 | 1376 | 965 | 411 | 540 | 157 | 23 | 11 | 39 | 51 | 39 | 78 | 38 | 244 |
| Average | 2135.3 | 1401.1 | 756.3 | 711.9 | 273.7 | 26.8. | 13.2 | 33.3 | 45.5 | 36.5 | 65.7 | 33 | 230 |

# 1990 RESULTS
## AVERAGE CANNABIS YIELDS

| PLANTING DENSITY | YIELDS | TYPE |
|---|---|---|
| 9 SQ. FT. | 233 GRAMS | COLOMBIAN |
| 18 SQ. FT. | 787 GRAMS | INDICA |
| 81 SQ. FT. | 1011 GRAMS | MEXICO-A |
| 81 SQ. FT. | 842 GRAMS | MEXICO-B |
| 81 SQ. FT. | 457 GRAMS | MEXICO-C |
| --- | --- | --- |
| 9 SQ. FT. | 222 GRAMS • | MEXICAN-MS |
| 9 SQ. FT. | 274 GRAMS • | COLOMBIAN- |

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GOVERNMENT EXHIBIT 2

Table 4 - 1991

# 1991 RESULTS
## AVERAGE CANNABIS YIELDS

| PLANTING DENSITY | YIELD | TYPE/STATE |
|---|---|---|
| 9 SQ. FT. | 227 GRAMS (0.5 LBS) | MEX / ● MS |
| 36 SQ. FT. | 914 GRAMS (2.0 LBS) | MEX / ● MS |
| 72 SQ. FT. | 1152 GRAMS (2.5 LBS) | MEX / ● MS |

N =23 YIELD ADJUSTED FOR SEED WEIGHT & AIR DRY

GOVERNME
EXHIBIT
3